

**FILED**

DEC 05 2014

**RICHARD W. WIEKING**  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE

NOT FOR CITATION

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JONATHAN CARDENAS,

Petitioner,

vs.

GARY SWARTHOUT,

Respondent.

No. C 13-4199 LHK (PR)

ORDER DENYING PETITION FOR  
WRIT OF HABEAS CORPUS;  
DENYING CERTIFICATE OF  
APPEALABILITY

Petitioner, a state prisoner proceeding *pro se*, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The court ordered respondent to show cause why the petition should not be granted. Respondent has filed an answer. Although given an opportunity, petitioner has not filed a traverse. Having reviewed the briefs and the underlying record, the court concludes that petitioner is not entitled to relief based on the claims presented, and DENIES the petition.

#### PROCEDURAL HISTORY

In 2008, a jury found petitioner guilty of second degree murder. The jury also found true the allegation that petitioner personally used a knife. Petitioner was sentenced to a term of 16 years to life in state prison. On March 15, 2012, the California Court of Appeal affirmed

1 petitioner's convictions and judgment. On June 13, 2012, the California Supreme Court denied  
2 petitioner's petition for review.

3 On September 10, 2013, petitioner filed the underlying federal petition for writ of habeas  
4 corpus.

## 5 BACKGROUND<sup>1</sup>

### 6 A. Prosecution Case

7 On October 6, 2008, Cardenas was at home drinking beer with his friends  
8 Paris Lenc and Ryan Lanthier. Cardenas had a shiny pocket knife on his  
9 dresser. The three went to Lenc's home and smoked some marijuana. Lenc  
10 grabbed two steak knives, keeping one and handing the other to Lanthier. At  
11 some point, Lenc got a call from a minor female, N.C., asking him to come  
12 hang out with her.

13 N.C. and her friend Samantha I. (also a minor) had rented a motel room at the  
14 Paradise Inn near the Santa Cruz Beach Boardwalk. Cardenas, Lenc and  
15 Lanthier met Samantha and N.C. at a bowling alley near the Paradise Inn.  
16 Neither N.C. nor Samantha had ever met Cardenas or Lanthier before, but  
17 Samantha was immediately attracted to Cardenas. The group went back to the  
18 motel room, where they drank some beer and Samantha flirted with Cardenas.

19 After 15 to 30 minutes, Samantha and N.C. went to a nearby liquor store to  
20 buy more beer. On the way to the store, they ran into Robbie Reynolds and  
21 his two friends, Joseph Paul and Jose Reyes. The group continued to the  
22 store, where Samantha bought six large cans of beer, using a fake I.D., and  
23 Paul bought a cigar, which they would use to smoke marijuana. Samantha  
24 and N.C. invited Reynolds, Paul and Reyes back to the motel room to play  
25 games and drink beer. Paul got the impression that they would "smoke and  
26 drink and just chill."

27 When they got back to the room, Samantha and N.C. entered first, followed  
28 by Reynolds and the other two men. When they saw Cardenas, Lenc and  
Lanthier in the room, the three newcomers became quiet. Neither Samantha  
nor N.C. had mentioned that there were other men in the room already. Paul  
recognized Cardenas, though he did not know his name, and he noticed that  
Cardenas, Lenc and Lanthier were all wearing black.

Paul sat in a chair, while Reynolds sat on one end of the bed and Reyes sat  
down on the other end. Reynolds took out some marijuana, which he gave to  
Paul to roll into the cigar. Samantha placed her purse on the bed, opened a  
beer and passed out the other beers.

After a couple of minutes, Paul said one of the other three men asked, "where  
you from, where you guys from?" which he understood was a gang-related  
question. Lanthier volunteered he was from "West Side Santa Cruz," and  
Reynolds may have said he used to live in West Side Santa Cruz, but now was

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<sup>1</sup> The following facts are taken from the California Court of Appeal's opinion.

1 “downtown, and we don’t gangbang or anything.” Lenc was quiet, but  
2 Cardenas and Lanthier asked if the other men were “down with gangbang.”  
3 Paul, Reynolds and Reyes said they were not, but “just like to chill and smoke  
4 and have a good time.”

5 Cardenas, who was wearing an Atlanta Braves cap, introduced himself as  
6 “Cartoon,” and said he was from West Side Santa Cruz but had moved from  
7 Salinas to Santa Cruz. He also said he was a Northerner, which Paul  
8 understood to mean “Norteno.”

9 Paul asked Cardenas if he remembered him, and Cardenas said he did.  
10 Cardenas had recently beaten up one of Paul’s friends. Cardenas asked “are  
11 you with him [i.e., the friend who got beaten up]?” but Paul said he was not.  
12 Smiling, Cardenas said he “beat him up pretty good.” After that exchange,  
13 Paul stopped talking to Cardenas, Lenc and Lanthier.

14 Cardenas and Samantha were continuing to flirt and went into an adjoining  
15 bedroom for 15 to 45 minutes. They talked and had sex. Everyone else  
16 remained in the main room, and Reynolds turned the volume up on the  
17 television to try to cover the sounds of the two having sex in the back.  
18 Reynolds talked about Samantha being promiscuous and asked N.C. why she  
19 did not warn Cardenas that Samantha was “nasty.” Everyone joked and  
20 laughed about how Samantha had just met Cardenas and was having sex with  
21 him. Reynolds took a marker and wrote “FTW” [FN2] on the wall, then  
22 started going through Samantha’s purse on the bed.

23 FN2. “Fuck the world.”

24 After Samantha and Cardenas returned to the room, someone suggested they  
25 needed more alcohol, and Samantha said she had money. She looked in her  
26 purse and discovered she was missing \$60. Samantha asked everyone but  
27 Cardenas and N.C. where her money was. Reynolds was laughing and said,  
28 “why would I take your money, I got money.” Samantha started getting more  
aggressive and louder, demanding that Reynolds, Paul and Reyes turn out  
their pockets. Reynolds would not do so, and said, “bitch, no one wants your  
money.” Samantha told Reynolds, Paul and Reyes to leave, and then she and  
Reynolds continued to yell and swear at each other at the doorway for a few  
minutes. Samantha kept saying “fuck you, Robbie” and “that’s fucked up,  
Robbie.” Reynolds got angry and said, “bitch, shut up.”

Reynolds started walking towards the motel office, and Paul said, “Come on,”  
“if you’ve got it [i.e., Samantha’s money], come back and give it to her.” As  
Samantha continued to curse at Reynolds he walked back to the door of the  
room and, laughing, threatened to slap her. Cardenas was standing behind  
Samantha, to one side.

Reynolds slapped or hit Samantha on the cheek. [FN3.] Almost immediately,  
Cardenas punched Reynolds in the jaw. Reynolds’ knees buckled, and he fell  
back against the door, but then got up swinging, as if trying to push Cardenas  
away. Cardenas stepped back and Reynolds’ swing missed. The two then  
began swinging at each other. Paul and Reyes came back into the room and  
Reyes saw Lanthier and Lenc moving towards Reynolds. Reyes pushed  
Lanthier, who fell on the bed. Lanthier got up, pulled out a knife and  
threatened Reyes, telling him to get out.



1 FN3. Samantha testified Reynolds punched her with his hand closed.  
 2 Paul testified it was an open-handed slap. Reyes recalled it being  
 3 more of a "push."

4 Paul told Lenc to back away from Cardenas and Reynolds so it would be a fair  
 5 fight. He looked over and saw that Lanthier had pulled out a knife. As he  
 6 turned back to Lenc, Lenc pulled out a short switchblade knife, so Paul  
 7 grabbed him and swept his leg out from underneath him, knocking him to the  
 8 floor. Paul saw Cardenas lying on the bed with Reynolds leaning over him,  
 9 trying to hit him in the chest. Reynolds' torso was within a few inches of  
 10 Cardenas' torso. Cardenas' hand was on Reynolds' shoulder, pulling him  
 11 down toward himself. Paul saw Reynolds land three punches on Cardenas,  
 12 whereas five or six of Cardenas' punches connected. The fight lasted about a  
 13 minute or two.

14 About 20 seconds after Reynolds and Cardenas were fighting on the bed, they  
 15 separated, and Reynolds walked out of the motel room, with Paul and Reyes  
 16 behind him. Lanthier flashed his knife and told Reyes, "get out," "we don't  
 17 want to stab nobody, get out." Paul did not see Cardenas holding a knife and  
 18 did not know Reynolds had been stabbed. Cardenas walked backward toward  
 19 the door, saying "I'm cool" twice.

20 Reynolds walked away from the room, touched his ribs and then fell face first  
 21 in the parking lot, apparently unconscious. Paul tried to pick him up, and  
 22 realized Reynolds had been stabbed. He saw blood on Reynolds' chest and  
 23 told Reyes to call 911.

24 Reyes saw Reynolds appeared to be struggling for breath, and he tried to  
 25 cover the wound while he talked to him. Reyes called 911. He later claimed  
 26 he did not recall seeing Cardenas with a knife, but admitted he did not want to  
 27 talk about the incident.

28 Paul was angry and wanted to fight Cardenas, but Cardenas had run away up  
 the street. Paul sprinted after him, but lost him. When he heard sirens, he ran  
 down the hill and saw Reyes holding Reynolds. Because he believed there  
 was a bench warrant for his arrest for failing to appear in court, Paul ran off  
 down the street. Paul encountered Lenc, who held up his hands to indicate he  
 did not want to fight. Lenc said, "I didn't know he was going to stab your  
 homie." In his interview with police, Paul said Lenc had said, "you seen him,  
 he just stabbed your homie." Paul walked around downtown for a couple of  
 hours, then fell asleep at a park across from Reynolds' house.

### 1. Samantha's trial testimony

Samantha testified that after Reynolds left the motel room and she was about  
 to close the door, he said, "well, I should hit a bitch." She responded, "well,  
 hit a bitch then." As she stood in the doorway, Reynolds punched the left side  
 of her face. Samantha grabbed her nose, and next saw Cardenas and Reynolds  
 fighting. She did not know who started the fight. At one point she saw  
 Reynolds leaning over Cardenas who was lying on the bed with his feet on the  
 floor. Samantha said she saw Reynolds punch Cardenas once, but also said  
 she did not see Reynolds punch him. She did not see Cardenas punch  
 Reynolds, but saw him grab Reynolds to push him off. She had a vague

1 memory of seeing Cardenas holding Reynolds.

2 At some point she saw Cardenas standing on a round table next to the bed and  
3 admitted telling police Cardenas was standing on a table. Cardenas screamed,  
4 but Samantha could not remember what he said. She was not absolutely  
5 certain, but thought he may have yelled, "I'm going to stop this fool," or "I'm  
6 going to stab this fool."

7 After Reynolds fell down, Samantha saw "everybody running out the door."  
8 When she heard the sirens, she ran away to avoid contact with the police  
9 because she herself was a runaway. She went to a nearby motel and called her  
10 mother.

11 Samantha testified she did not see anyone with a knife, and denied  
12 remembering that she told the police she saw Cardenas with a knife or that he  
13 held a knife in his right hand and pulled it out of Reynolds' side. She  
14 admitted liking and having strong feelings for Cardenas, and also admitted  
15 lying to police about his name.

16 Samantha admitted having a tattoo of four dots on her hand, which she said  
17 meant she is a "North Sider," and "back[s] up Nortos to the fullest." She  
18 testified that she got this tattoo after the murder, and it indicated "you're in a  
19 gang, that you have been jumped in."

## 2. Samantha's police interviews

20 In her interview with police, however, Samantha said that Cardenas stabbed  
21 Reynolds. When Santa Cruz Police Detective Gregory Crofts interviewed  
22 Samantha on October 7, it appeared that she was holding back information.  
23 After she learned that Reynolds had died, she returned to the police  
24 department upset and volunteered more information. She identified Cardenas  
25 by name, said he was from Salinas, and he had stabbed Reynolds at the motel.

26 Samantha told police that Cardenas came forward after Reynolds hit her and  
27 began fighting with Reynolds. She and N.C. tried to break up the fight.  
28 Cardenas, Lenc and Lanthier all had knives. She mentioned that Cardenas  
was standing on a table, and she saw him pull out the knife, with the blade  
protruding between his thumb and index finger. Cardenas was holding the  
knife in his right hand and stabbed Reynolds on the left while he was partially  
turned away from Cardenas. However, she also sometimes said that Reynolds  
fell on the knife. After everyone left the room, Cardenas came back to  
retrieve his hat.

In her interview with Santa Cruz Police Detective Michael Hedley, Samantha  
similarly described Reynolds as partially turned away from Cardenas when he  
was stabbed. Samantha said she "saw [Cardenas] pulling the knife back, and  
it was kind of like a surprise moment" for her. It was her impression that  
Cardenas pulled the knife because he was angry. She could not recall if he  
jumped on the table before or after he stabbed Reynolds, but she "did see him  
jump on the table." Cardenas was screaming something, and she was unsure  
what it was, but he "might have said something about the knife."

Prior to trial, District Attorney Inspector Raul Castellanos photographed  
Samantha's tattoos, which consisted of the four dots on her hand, as well as

1 the words "Santa Cruz" on her leg. Samantha told Castellanos that she got the  
2 four dots tattoo before the murder, and the "Santa Cruz" tattoo afterwards.

### 3 3. N.C.'s trial version of the fight

4 N.C. saw Cardenas and Reynolds hitting each other, saying Reynolds was  
5 "going crazy" and "kicking ass." She did not see anyone with a knife. N.C.  
6 said she stepped between Cardenas and Reynolds, put her arms around  
7 Reynolds and told him to stop. She heard Samantha also telling Reynolds to  
8 stop, but could not remember what Samantha was doing otherwise or where  
9 anyone else was at the time.

10 N.C. heard Cardenas yell, while standing on the bed, "I'm going to stab him."  
11 She did not think this was serious, so she walked into the bathroom. The next  
12 thing she knew, Samantha knocked on the bathroom door and told her to "get  
13 out." Samantha appeared scared and everyone had already left the room.

14 N.C. did not see anyone stabbed and did not see anyone with a knife. She did  
15 not recall telling the police that Cardenas had a purple knife. Outside, N.C.  
16 saw Cardenas, Lenc and Lanthier running toward the bowling alley and she  
17 saw Reynolds on the ground in the parking lot. Samantha was scared and sad.  
18 She heard Reyes telling Reynolds to breathe. She called 911, and Reyes told  
19 her, "don't tell the cops what happened." Samantha ran away, but she and  
20 Reyes stayed with Reynolds.

### 21 4. N.C.'s police interview

22 N.C. and Samantha met up with Cardenas, Lenc and Lanthier by the bowling  
23 alley before they went back to the motel room. She and Samantha went  
24 downtown to buy more alcohol and ran into Reynolds, Reyes and Paul. They  
25 invited them back to the motel room as well.

26 Reynolds asked Cardenas and his friends if they were West Siders, and they  
27 said they were. It seemed as if everyone was getting along. Samantha and  
28 Cardenas went into the back room and had sex, and everyone else made fun of  
them. Reynolds was "talking some shit" about Samantha. When Samantha  
came back to the main room, she looked in her purse and said her money was  
missing. She accused Reynolds of taking it and began arguing with him.  
Reynolds told her to shut up or he would slap her. Samantha said, "just hit  
me," and he did. Samantha started to cry and everyone started fighting.

N.C. thought Reynolds was "kicking [Cardenas's] ass," and thought Reynolds  
punched Cardenas quite a few times. Reynolds, Reyes and Paul did not have  
weapons, but Cardenas had a knife. She saw him stand on a table, holding his  
purple knife, and saying, "I'm going to stab him." N.C. did not see Reynolds  
get stabbed and assumed it happened outside, since that is where he fell.

### 25 5. Police response

26 Alexander Ganzel, a City of Santa Cruz police officer, received a dispatch to  
27 respond to the Paradise Inn on Second Street at 11:40 p.m. on October 6,  
28 2008. He was the first officer to arrive on the scene and upon parking in the  
motel lot, he saw three people. Reynolds was lying on his back. Reyes knelt  
beside him, pressing on his chest, while N.C. stood nearby, crying. Ganzel



1 ran up to them and asked them who had done this. Reynolds was  
2 unresponsive, his eyes were droopy and he was gasping for air. Ganzel  
3 looked for injuries and found what appeared to be a knife wound on the left  
side of Reynolds' chest and a second wound on his chin. Reyes and N.C. both  
claimed that they had just found Reynolds lying in the parking lot.

4 Santa Cruz Police Officer William Clayton arrived about the same time as  
5 Ganzel. He saw Reynolds struggling to breathe and losing consciousness.  
6 When Clayton asked Reynolds what happened, Reyes interrupted and told  
Reynolds in a defensive and hostile tone, "[d]on't say anything to him."

7 Santa Cruz Police Officer Sergio Venegas contacted Lenc, who was near the  
8 Paradise Inn. Lenc said he had been at home with his mother. When Venegas  
searched Lenc's room at his house, he collected a knife from the front pocket  
of a pair of jeans on the floor.

9 Santa Cruz Police Detective Dave Forbus interviewed Reyes some hours after  
10 the murder. Reyes appeared tired, anxious and in shock. He admitted he was  
scared. Reyes said Cardenas punched Reynolds first, then Lenc hit Reynolds  
11 in the face. Reyes saw Cardenas with a knife, and Lanthier brandished a knife  
at him after Reynolds walked out of the hotel room. Reyes said the fight  
12 lasted only 15 seconds. Forbus described Reyes as hesitant and confused; he  
was fearful of being labeled a snitch.

13 When Santa Cruz Police Detective David Pawlak interviewed Reyes again on  
14 October 7, Reyes was not forthcoming. At first, Reyes claimed the incident  
had nothing to do with gangs, he did not see any knife and did not see anyone  
swing at Reynolds. Later, he said there was some pushing. He also said he  
15 heard, "West Side," but claimed he paid no attention to that. Reyes did not  
want to give the police any information and was, in part, afraid of being a  
16 snitch. Later, he said all three of the other men – Cardenas, Lenc and Lanthier  
– had knives.

17 District Attorney Inspector Lewis [FN4] Schlumbrecht drove Reyes home  
18 from the courthouse during the trial. Schlumbrecht said that Reyes was  
nervous and constantly looking around to see if they were being followed.

19 FN4. Called to the stand as Kent, but when sworn in, corrected the  
20 court that his first name was Lewis.

21 On October 9, Forbus interviewed Paul, who said Cardenas introduced  
himself as "Cartoon" and asked, "are you guys down with gangbanging." He  
22 said Cardenas said he was a Northerner and his friends said they were West  
Side, but it was not said aggressively. Reynolds called Samantha a bitch  
23 before slapping her; Paul described it as a "little slap." Paul said Cardenas  
punched Reynolds "out of nowhere." Reynolds fought with Cardenas, trying  
24 to put him down, but no one was really winning the fight. The two ended up  
on the bed because "we were all pushing at them" and there was very little  
25 room between the bed and the door.

26 Paul did not see a knife in Cardenas' hand, did not see him stand on a table  
and did not hear him threaten to stab anyone. While he was fighting with  
27 Lenc, he saw Reynolds walk out. Detective Forbus, who interviewed Paul,  
described his demeanor as direct, confident and sad.

1 Lanthier thought Cardenas and Lenc were West Siders, and he admitted  
2 telling police they were West Side Nortenos. His nickname was "Ryder," and  
3 Lenc's was "Bloody." Lanthier initially did not say much to the police,  
4 hoping the situation would "just go away." He admitted in his interview he  
5 was trying to protect Lenc.

#### 6. Autopsy

6 Dr. Richard Mason determined Reynolds' cause of death to be a stab wound  
7 to the right ventricle of the heart, resulting in hemothorax and  
8 hemopericardium, meaning a collection of blood in the chest and sac around  
9 the heart. The knife wound was one inch long and two inches deep, and was  
10 inflicted by a single-edged blade with the cutting edge facing the midline of  
11 Reynolds' torso. It penetrated between the sixth and seventh rib,  
12 perpendicular to his body, and was an "in and out" wound, meaning Reynolds  
13 was stationary when the wound was inflicted. It was possible the stabber  
14 grabbed Reynolds and pulled him toward the knife.

15 Immediately after the stabbing, blood began to accumulate in the pleural  
16 space around Reynolds' left lung, making him feel like he could not breathe.  
17 His blood pressure would have dropped suddenly, causing confusion and  
18 panic within about 30 seconds of the stabbing.

19 Reynolds also had a bruise on his left eye, a bruise on his left elbow, and  
20 small bruises on the knuckles of his left pinky and middle fingers. He had an  
21 abrasion on his chin consistent with landing on a rough surface, such as  
22 asphalt.

23 Reynolds' blood alcohol level was 0.129 percent and also tested positive for  
24 marijuana, meaning he had ingested marijuana anywhere from 30 minutes to  
25 one week prior to death. He had \$22 in cash and 4.7 grams of marijuana in  
26 his pocket.

27 A purple knife was recovered from an apartment patio not far from the motel,  
28 and DNA on the knife matched Reynolds' DNA.

#### 7. Gang evidence

29 Santa Cruz Police Detective Jose Garcia, a gang expert, was the lead detective  
30 in the case. Garcia testified that Nortenos, or Northerners, associate with the  
31 color red, as well as the numbers 14 and 4. Cardenas was a member of a  
32 Salinas Norteno street gang, Acosta Plaza, at the time of the murder. The  
33 Atlanta Braves baseball cap he wore the night of the murder was associated  
34 with Acosta Plaza.

35 Lenc was also a member of a Norteno street gang and had "Northside"  
36 tattooed above his eyebrows, as well as an "S" and a "C," representing "Santa  
37 Cruz," on his cheeks.

38 Garcia also testified that Santa Cruz is predominantly a Sureno city, and the  
39 Beach Flats area was Sureno territory.

40 According to Garcia, the concept of respect is very important within a gang.



1 Respect may be earned by committing violent crimes or by being a good  
 2 leader. Respect is lost if a gang member acts cowardly, loses a fight, or fails  
 3 to respond to a challenge, which may consist of a slight, an insult, a  
 4 challenging look, claiming membership in a rival gang or flashing a rival gang  
 5 sign/tattoo. When someone claims a gang, it is meant as an assertion of  
 6 dominance and a challenge to rival gang members. If someone asks "Where  
 7 you from," the question can actually mean, "What gang are you in?" Any  
 8 disrespect directed towards anyone closely associated with a gang member,  
 9 such as family, girlfriends and close friends, is considered disrespect towards  
 10 the gang member. If someone "punks out" in front of a fellow gang member,  
 11 it is a problem. Gang members frequently carry weapons, including knives.

12 In gang culture, being a "snitch" can lead to serious, negative consequences,  
 13 up to and including being killed. A gang expects its members not to talk to  
 14 the police or anyone outside the gang about fellow gang members and the  
 15 gang's activities.

16 *People v. Cardenas*, No. H035900, 2012 WL 882887, \*1 - \*8 (Cal. App. March 15, 2012).

## 17 DISCUSSION

### 18 A. Standard of Review

19 This court may entertain a petition for writ of habeas corpus "in behalf of a person in  
 20 custody pursuant to the judgment of a State court only on the ground that he is in custody in  
 21 violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The  
 22 petition may not be granted with respect to any claim that was adjudicated on the merits in state  
 23 court unless the state court's adjudication of the claim: "(1) resulted in a decision that was  
 24 contrary to, or involved an unreasonable application of, clearly established Federal law, as  
 25 determined by the Supreme Court of the United States; or (2) resulted in a decision that was  
 26 based on an unreasonable determination of the facts in light of the evidence presented in the  
 27 State court proceeding." 28 U.S.C. § 2254(d).

28 "Under the 'contrary to' clause, a federal habeas court may grant the writ if the state  
 court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of  
 law or if the state court decides a case differently than [the] Court has on a set of materially  
 indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). "Under the  
 'reasonable application clause,' a federal habeas court may grant the writ if the state court  
 identifies the correct governing legal principle from [the] Court's decisions but unreasonably  
 applies that principle to the facts of the prisoner's case." *Id.* at 413.

1 “[A] federal habeas court may not issue the writ simply because the court concludes in its  
 2 independent judgment that the relevant state-court decision applied clearly established federal  
 3 law erroneously or incorrectly. Rather, the application must also be unreasonable.” *Id.* at 411.  
 4 A federal habeas court making the “unreasonable application” inquiry should ask whether the  
 5 state court’s application of clearly established federal law was “objectively unreasonable.” *Id.* at  
 6 409.

7 B. Analysis

8 In the petition, petitioner claims that: (1) the trial court improperly admitted evidence  
 9 regarding gangs and petitioner’s prior statements about gang culture even though there was no  
 10 evidence that petitioner’s offense was gang-related; (2) the trial court erred in refusing  
 11 petitioner’s request to modify CALCRIM Nos. 371 and 372 to instruct the jury that  
 12 “consciousness of guilt may not be considered in determining the degree of defendant’s guilt”;  
 13 and (3) the cumulative errors prejudiced him.

14 1. Admission of gang-related evidence

15 Petitioner argues that the trial court should not have allowed the prosecution to introduce  
 16 gang evidence or petitioner’s prior statements about gang culture because there was no gang  
 17 enhancement charged, and no allegation that the killing was gang-related.<sup>2</sup>

18 At trial, the prosecution moved to introduce gang evidence as well as to allow a gang  
 19 expert to testify about the Norteno gang and gang culture. *Cardenas*, 2012 WL 882887, at \*8.  
 20 The expert would specifically testify about the “concepts of respect and disrespect in gang  
 21 culture, the significance of claiming gang membership, the nature of gang assaults, what it means  
 22

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23 <sup>2</sup> Respondent argues that this claim is unexhausted. A federal court may deny an  
 24 unexhausted claim or petition on the merits when it is clear that the applicant does not raise a  
 25 colorable federal claim. *See Cassett v. Stewart*, 406 F.3d 614, 623-24 (9th Cir. 2005). Here,  
 26 because the court has determined that petitioner’s claim is not a colorable federal claim, the court  
 27 need not reach the issue of exhaustion. Rather, the court exercises its discretion and denies the  
 28 claim on the merits. *See* 28 U.S.C. § 2254(b)(2) (“[a]n application for a writ of habeas corpus  
 may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies  
 available in the courts of the State”).

1 when a gang member arms him/herself and the importance of supporting another gang member.”  
2 *Id.* In addition, the prosecution sought to introduce that a few months before the stabbing,  
3 petitioner told a police officer that if someone had said something disrespectful about  
4 petitioner’s mother, he “would not just stand by and do nothing.” *Id.* at \*12. Also, petitioner  
5 said it would be dangerous for someone to yell “Norte” or “West Side,” or shout gang slogans  
6 because it would probably lead to fights and shootings. *Id.*

7 The California Court of Appeal rejected petitioner’s claim based on state law. It found  
8 that the gang evidence was relevant to petitioner’s motive. “[T]he theory of the prosecution was  
9 that Cardenas felt disrespected when Reynolds hit Samantha, a girl with whom he had recently  
10 had sex. Cardenas could not allow that challenge to his dominance go unanswered, particularly  
11 since at least one fellow gang member, Lenc, was present. Consequently, he attacked Reynolds  
12 and, when he began to lose the fight, which would have resulted in a loss of respect within his  
13 gang culture, Cardenas pulled out his knife and stabbed Reynolds.” *Id.* at \*9. Moreover, the  
14 appellate court concluded that the probative value of the gang related evidence was not  
15 outweighed by its prejudice. *Id.* In addition, the appellate court found that petitioner’s prior  
16 statements were relevant to show that petitioner had the mentality of a gang member, as  
17 described by the gang expert. *Id.* at \*12. Thus, concluded the state appellate court, petitioner’s  
18 prior statements were relevant to demonstrate that the stabbing was likely motivated by gang  
19 culture, and that petitioner did not “just stand by and do nothing” when Samantha was  
20 “disrespected.”

21 The admission of evidence is not subject to federal habeas review unless a specific  
22 constitutional guarantee is violated or the error is of such magnitude that the result is a denial of  
23 the fundamentally fair trial guaranteed by due process. *See Henry v. Kernan*, 197 F.3d 1021,  
24 1031 (9th Cir. 1999). The Supreme Court “has not yet made a clear ruling that admission of  
25 irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant  
26 issuance of the writ.” *Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009) (finding that  
27 trial court’s admission of irrelevant pornographic materials was “fundamentally unfair” under  
28



1 Ninth Circuit precedent but not contrary to, or an unreasonable application of, clearly established  
2 Federal law under § 2254(d)). Because there is no “clearly established” federal law regarding  
3 this issue, this federal claim must be denied.

4 In addition, the due process inquiry in federal habeas review is whether the admission of  
5 evidence was arbitrary or so prejudicial that it rendered the trial fundamentally unfair. *Walters v.*  
6 *Maass*, 45 F.3d 1355, 1357 (9th Cir. 1995). Only if there are no permissible inferences that the  
7 jury may draw from the evidence can its admission violate due process. *See Jammal v. Van de*  
8 *Kamp*, 926 F.2d 918, 920 (9th Cir. 1991).

9 Here, as the state appellate court found, the gang-related evidence was relevant to  
10 demonstrate petitioner’s motive. The jury had already heard evidence that petitioner told the  
11 others that petitioner was a Northerner, and the initial introductions between petitioner and the  
12 others in the hotel room had gang overtones in that the other young men understood petitioner to  
13 be a Norteno. The prosecution’s theory of the case was that petitioner stabbed Reynolds because  
14 Reynolds had just disrespected Samantha, with whom petitioner recently had sexual intercourse.  
15 According to gang culture, by extension, Reynolds had disrespected petitioner as well. Thus,  
16 gang-related evidence and testimony from the gang expert, as well as petitioner’s prior  
17 statements about gang members’ mentality were relevant to demonstrate gang culture, gang  
18 concepts of respect and disrespect, and how the slapping of Samantha would motivate petitioner  
19 to stab Reynolds.

20 Finally, even assuming that it was error to admit gang-related evidence, petitioner has not  
21 shown that error had “a substantial and injurious effect or influence in determining the jury’s  
22 verdict.” *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). As the state appellate court noted,  
23 “the evidence presented at trial did not support either a verdict of manslaughter or a viable claim  
24 of self-defense. Manslaughter is not an available defense where the defendant engages in mutual  
25 combat and then takes undue advantage of his victim by using a deadly weapon. The evidence  
26 showed: (1) Cardenas armed himself with a knife before meeting two girls in Santa Cruz;  
27 (2) Cardenas initiated the fistfight with Reynolds; and (3) Cardenas, at some point during the  
28

1 fight, pulled out his knife and stabbed his unarmed opponent in the chest.” *Cardenas*, 2012 WL  
2 882887, at \*12 (citation omitted). Moreover, petitioner proffered no evidence suggesting that  
3 the stabbing was in self-defense. Thus, even without the gang-related evidence, based on the  
4 evidence at trial, petitioner could not have been convicted of the lesser-included offenses, and  
5 still would have been found guilty of second degree murder.

6 Accordingly, the state court’s rejection of this claim was not contrary to, or an  
7 unreasonable application of, clearly established federal law. *See* 28 U.S.C. § 2244(d).

8 2. Jury instructions

9 Petitioner claims that the trial court erred when it refused to modify CALCRIM Nos. 371  
10 and 372 to instruct the jury that “consciousness of guilt may not be considered in determining the  
11 degree of defendant’s guilt.” Petitioner asserts that the instructions as given permitted the jury to  
12 impermissibly infer that petitioner was necessarily guilty because petitioner fled the scene and  
13 tried to conceal evidence.

14 At trial, the jury was instructed with CALCRIM Nos. 371 and 372:

15 If the defendant tried to hide evidence, that conduct may show that he was  
16 aware of his guilt. If you conclude that defendant made such an attempt, it is up  
17 to you to decide its meaning and importance. However, evidence of such an  
18 attempt cannot prove guilt by itself.

19 If the defendant fled immediately after the crime was committed, that conduct  
20 may show that he was aware of his guilt. If you conclude that the defendant  
21 fled, it is up to you to decide the meaning and importance of that conduct.  
22 However, evidence that the defendant fled cannot prove guilt by itself.

23 (Resp. Ex. B, RT 3286.)

24 The California Court of Appeal rejected petitioner’s claim, recognizing that the  
25 instructions as given permitted, but did not mandate the jury to conclude that petitioner’s  
26 concealment of evidence and petitioner’s immediate flight after the stabbing showed  
27 consciousness of guilt. *Cardenas*, 2012 WL 882887, at \*13. The state appellate court relied on  
28 state law and concluded, “[W]e have repeatedly rejected the argument that instructions on  
consciousness of guilt, including instructions regarding the defendant’s flight following the  
crime, permit the jury to draw impermissible inferences about the defendant’s mental state, or are

1 otherwise inappropriate where mental state, not identity, is the principal disputed issue.” *Id.*  
2 (quoting *People v. Martinez*, 47 Cal. 4th 399, 450 (2009)).

3 A challenge to a jury instruction solely as an error under state law does not state a claim  
4 cognizable in federal habeas corpus proceedings. See *Estelle v. McGuire*, 502 U.S. 62, 71-72  
5 (1991). To obtain federal collateral relief for errors in the jury charge, a petitioner must show  
6 that the ailing instruction by itself so infected the entire trial that the resulting conviction violates  
7 due process. *Id.* at 72. Instructions that merely create a permissive inference, such as the ones at  
8 issue here, do not shift the burden of proof, but they nonetheless violate due process unless it can  
9 be said ““with substantial assurance”” that the inferred fact is ““more likely than not to flow from  
10 the proved fact on which it is made to depend.”” *County Court of Ulster County v. Allen*, 442  
11 U.S. 140, 167 & n.28 (1979) (quoting *Leary v. United States*, 395 U.S. 6, 36 (1969)).

12 Here, the instructions as given left both the existence and significance of the  
13 circumstances to the jury. The wording of the instructions, combined with other instructions,  
14 directed the jury to ignore instructions found inapplicable to the facts. Further, the jury was  
15 instructed that, even if flight or concealment occurred, that evidence alone was not enough to  
16 prove guilt. The instructions did not shift or reduce the burden of proof.

17 Thus, the California Court of Appeal’s rejection of the claim was not contrary to, or an  
18 unreasonable application of, clearly established federal law.

19 3. Cumulative prejudice

20 Petitioner’s last claim is that he is entitled to habeas relief based on the cumulative effect  
21 of the alleged state court errors. In some cases, although no single trial error is sufficiently  
22 prejudicial to warrant reversal, the cumulative effect of several errors may still prejudice a  
23 defendant so much that his conviction must be overturned. See, e.g., *Alcala v. Woodford*, 334  
24 F.3d 862, 893-895 (9th Cir. 2003) (reversing conviction where multiple constitutional errors  
25 hindered defendant’s efforts to challenge every important element of proof offered by  
26 prosecution). However, where no single constitutional error exists, nothing can accumulate to  
27 the level of a constitutional violation. See *Mancuso v. Olivarez*, 292 F.3d 939, 957 (9th Cir.



1 2002).

2 **CONCLUSION**

3 Petitioner's petition for writ of habeas corpus is DENIED.

4 The federal rules governing habeas cases brought by state prisoners require a district  
5 court that denies a habeas petition to grant or deny a certificate of appealability ("COA") in its  
6 ruling. *See* Rule 11(a), Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254. Petitioner has  
7 not shown "that jurists of reason would find it debatable whether the petition states a valid claim  
8 of the denial of a constitutional right." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

9 Accordingly, a COA is DENIED.

10 The Clerk shall close the file.

11 IT IS SO ORDERED.

12 DATED: 12/4/14

Lucy H. Koh  
LUCY H. KOH  
United States District Judge